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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 412

CHARLES H. LAWTON, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on July 18, 1962.

Citation to Opinion Below

The opinion of the Court of Appeals is printed in Appendix A hereto, *infra*, p. 1a. It is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 18, 1962. (R. 527). A petition for rehearing was filed and was denied on August 7, 1962, without opinion. (R. 529-538). The jurisdiction of this Court is invoked under 28 U.S.C. S 1254(1).

Questions Presented

1. Whether an indictment which alleged that the defendants, *having knowledge* that the Commonwealth of Massachusetts would apply for and receive payments from the Bureau of Public Roads of the Department of Commerce under the Federal Aid Road Act, which payments would constitute partial reimbursement for damages paid to claimants in the taking of their real property for highway purposes as well as salaries and fees paid to appraisers and negotiators employed in connection with said takings, did conspire, "(a) to hamper, hinder, obstruct, and impede the lawful functions, operations and purposes of said Bureau of Public Roads . . . by impeding and preventing . . . a fair, honest and disinterested valuation and negotiation of damages . . . ; (b) to divert or cause to be diverted to the personal use . . . of the defendants . . . a large portion of money paid by the Commonwealth . . . ; (c) to cause the Commonwealth to pay . . . far in excess of the sum *which the . . . owner demanded and was willing to receive* . . . ", states an offense against the United States under 18 U.S.C., S 371. (Emphasis supplied).

2. Whether such an indictment can be proved as to the defendant, Lawton, in the absence of evidence: (a) that *he knew* of the nature and extent of the Federal Government's participation, (b) that he intended to defraud *the United States*, (c) when the conspiracy was formed, (d) that the

appraisal he submitted was not a fair appraisal of the property, (c) that he knew of and contributed to the conspiracy.

3. Whether a conspiracy has been proved such as to make the acts and declarations of certain alleged co-conspirators admissible against the defendant, Lawton.

4. Whether it was prejudicial and reversible error for the trial court to admit, over objection, evidence of acts of the petitioner and two alleged co-conspirators committed after the termination of the alleged conspiracy and not in furtherance thereof.

5. Whether there was such misconduct on the part of the prosecutor as to deprive petitioner of the fair trial guaranteed him by the Fifth Amendment in presenting a witness whose only contribution to the case was to inject in the minds of the jury an impression of the gravity of the case and to create an atmosphere prejudicial to the petitioner.

6. Was the Circuit Court unfair in deciding the case on a theory that was at variance with the indictment and with the law as set forth in the instructions of the trial judge to the jury.

Statutes Involved

The statutory provisions involved are 18 U.S.C. S 371; the Federal-Aid Highways Acts of 1958, 72 Stat. 885, 23 U.S.C. SS 101, 105, 106, 108, 109 and 110a, and Massachusetts General Laws, Ch. 79 S 12 all of which are printed in Appendix B. hereto, *infra* pp. 22a-31a.

Statement

The petitioner, Lawton, and two others were indicted for conspiring (together with five other persons named as co-conspirators, but not defendants,) to defraud the United States and an agency thereof, namely the Bureau of Public

Roads of the Department of Commerce, "that is to say, *having knowledge* that the Commonwealth (of Massachusetts) would apply for and receive payments from said agency under the Federal-Aid Road Act, as amended and supplemented, which payments would constitute partial reimbursement to the Commonwealth for damages paid by it to claimants in the taking of their real property for highway purposes as well as partial reimbursement for payment of salaries and fees paid to appraisers and negotiators employed in connection with said takings of real property, said defendants and co-conspirators did combine, conspire, confederate, and agree (a) to hamper, hinder, obstruct, and impede the lawful functions, operations and purposes of said Bureau of Public Roads of the Department of Commerce in the administration of the Federal-Aid Highway program by impeding and preventing by craft, trickery and deceit *a fair, honest, and disinterested valuation* and negotiation of damages resulting from the taking by the Commonwealth of the real property owned by Damort Land Corporation; (b) to divert or cause to be diverted to the personal use, gain and benefit of one or more of the defendants and co-conspirators a large portion of the money paid by the Commonwealth to Damort Land Corporation in payment for the real estate taken from said corporation, the share of said payment reimbursable by said agency of the United States being ninety per cent, contrary to and in derogation of the purpose and intent of the Commonwealth in making the said payment and contrary to and in derogation of the purposes and intent of the Federal-Aid Highway program and (c) to cause the Commonwealth to pay to Damort Land Corporation in payment for the real estate taken from said corporation an amount of money fair in excess of the sum which the said owner demanded and was willing to receive in full payment of its claim, all in viola-

tion of Title 18, United States Code, Section 371" (R. 8, 12-13). (Emphasis ours).

The District Court denied pre-trial motions to dismiss the indictment (R. 16-17), as well as motions to dispiss (R. 55), and for judgment of acquittal on the opening of the government (R. 55), and at the close of the evidence (R. 57).

The Court of Appeals has summarized the evidence in the light most favorable to the government (infra pp. 6a-12a). The significant evidence concerning the personal conduct of Lawton adds up to the following:

Since 1957, Lawton's real estate company, through its agent, Myette, had been handling a piece of real estate owned and dominated by one Webb. (Both Myette and Webb were named as co-conspirators but not as defendants). Probably in May of 1959, Lawton and Myette met with the defendant, Harney, at the Damort property. Harney was a right of way negotiator for the Commonwealth of Massachusetts assigned to the Damort land. (R. 140-142). On that occasion Harney suggested the desirability of legal representation in Boston and recommended the third defendant, O'Connell, as a man who could get the top price. (R. 142).

Thereafter, Lawton and Myette called on O'Connell in his Boston office after making an appointment by telephone. They found that Harney was there. O'Connell agreed to represent Damort only if he received written authorization. (R. 145-146).

On June 15, 1959, Webb wrote the Lawton Company authorizing them to act for Damort in negotiations for sale or eminent domain proceedings. (R. 202-203). Lawton wrote O'Connell the following day and engaged O'Connell as counsel for Damort. (R. 203-204).

Webb frequently inquired of Myette, by telephone, concerning the progress of negotiations. (R. 148). As a result of this, Myette and Lawton went to O'Connell's office a

second time where they again met Harney. (R. 148-149). Upon inquiry by Myette, O'Connell told them that these matters took time. This meeting probably took place in the first half of August, 1959. (R. 148). (Infra p. 8a).

On August 10, 1959, Massachusetts officially took the Damort land. (Infra p. 8a).

Some time before the end of August, 1959, Webb instructed Myette and Lawton not to see O'Connell any further and he terminated their connection with the matter of the taking of the Damort land. (R. 206, 208, 209, 224). In August and September of 1959, there was an exchange of letters between Myette and O'Connell dealing in general terms with the status of the case. (R. 163-166).

Later, in January of 1960, Lawton received a written assignment, from the Massachusetts Department of Public Works, to submit an appraisal on the damages suffered by Damort as a result of the taking of its land. (R. 241-242, 319, 321). In February, 1960, Lawton submitted his appraisal of $60,000.00 with a certificate under oath that he had no "interest" in the land, past, present or future (R. 320, 422). He received the usual fee of $500 for his appraisal. (R. 399).

On April 1, 1960, Myette read in a newspaper that Massachusetts had settled with Damort for $60,000. (R. 150). He called Webb and said he'd like to have some money when Damort received payment. (R. 150-151). Myette felt that Webb did not actually owe him any money but thought that they should receive something for the advice and service he and Lawton had rendered. On April 21, 1960, Webb sent C. H. Lawton & Son a check for $1,500.00 which he said he calculated at 5% of $30,000. On the stub of this check, Webb indicated that it was a "commission".

Myette and the Lawton Company divided the $1,500 equally. (Infra p. 10a).

During the summer of 1960, Webb was interviewed sev-

eral times by both agents of the FBI and by agents of a Congressional Committee. In August, or perhaps a month or two earlier, Myette and Lawton met with Webb at his office in Boston. On that occasion they matched their files and removed and destroyed all documents having any reference to a $30,000 valuation of the Damort land including a Lawton Company bill to Webb for a "commission" of $1,500 (Infra pp. 11a-12a).

The major portion of the evidence introduced to prove the alleged conspiracy was developed from conversations, correspondence, and action of other alleged co-conspirators made out of the presence or without the knowledge of Lawton. Most of this evidence was objected to, was admitted *de bene*, and was then submitted to the jury. Without attempting to be exhaustive, the most salient and pertinent evidence of this type was as follows:

After the meeting between Harney, Myette and Lawton in May of 1959, Myette reported the conversation to Webb, and Webb told him to "go ahead and handle it." Presumably, this meant to retain O'Connell as counsel. (Infra pp. 7a-8a).

"*At about this time* Harney called Webb on the telephone and asked him what he wanted for the Damort land. Webb replied that he wanted $30,000 and Harney then said: 'If I get you $35,000.00, is that all right?' to which Webb answered: 'O.K.'" (Emphasis ours. Quotation is from Court of Appeals Opinion, infra p. 8a).

It was shortly after this conversation that Myette and Lawton had their first meeting with O'Connell.

Early in the fall of 1960, one Potter made a casual appraisal of the Damort land at $35,000. (Infra p. 9a). Every two or three weeks during the fall, Webb communicated with O'Connell about progress. In mid-November, alleged co-conspirator Hopkins called Webb and made some inquiries about the land. Hopkins was a right of way nego-

tiator for the Commonwealth assigned to make a second appraisal of the property. (Infra p. 9a).

In the meantime, alleged co-conspirators Collins and Schwartz had been appointed to appraise the Damort land as "outside appraisers" for a fee. Collins submitted an appraisal of $65,000.00 and Schwartz an appraisal of $67,000.00 both on December 29, 1959. Hopkins appraised the damages at $54,000.00 (Infra p. 9a).

The foregoing three appraisals were then referred to the Department of Public Works Board of Review whose function is to set the maximum figure for settlement. (R. 117). The Review Board considered the three appraisals and sent the Damort matter back with a request for another fee appraisal. (R. 117-118). Lawton was then appointed as the third outside fee appraiser. After receipt of Lawton's appraisal, the maximum figure for settlement for the Damort land was set at $60,000 by the Review Board. Webb signed an agreement for settlement at this figure, with some adjustments, on March 1, 1960. (Infra p. 10a).

On April 4, 1960, Webb met with O'Connell and Harney for the purpose of endorsing the checks of the Commonwealth. A few days later, Webb received his net amount from the settlement. In essence, Webb received $30,000 and O'Connell retained $30,000. Webb had never made a fee arrangement with O'Connell and was never billed by him. It was his understanding that Damort would get $30,000 for the property and O'Connell would get any excess over that amount. (Infra p. 11a).

During the various meetings between Webb, O'Connell and Harney there were discussions in which vague, and possibly damaging phrases were employed. For example, Webb was once told that Hopkins "was straightened out—taken care of." (Infra p. 9a). When Webb asked how the $60,000 price had been arranged, Harney told him that the first three appraisals had been obtained "and *that when*

a fourth was required Lawton had made one for $60,000." (Infra p. 11a) (Emphasis ours). On this same occasion, Webb was advised to say the land was worth $60,000, and that it would not be wise to indicate that he had met Harney in O'Connell's office.

One Oscar H. Beasley was called as a witness by the government. He identified himself as a real estate appraiser employed by the Bureau of Public Roads to make right-of-way cost studies of portions of interstate highways in the United States. (R. 253). He was offered by the government to do a "critique" of the four appraisals on the Damont land. All of Beasley's further testimony was received over objections of defense counsel. (R. 256-265).

Beasley's critique dealt with his opinion that Schwartz had not used the comparative value approach and that Schwartz had erred in employing certain comparable sales.

Beasley was permitted to compare the appraisals of Schwartz and Collins. He testified that four of the five sales listed by Schwartz were identical with those in the Collins appraisal. (R. 262-263); that certain information in the appraisals were not in accordance with records on file at the Registry of Deeds and that the same error appeared in both of them.

Beasley testified about certain errors in mathematical computations he had found.

He was also permitted to "review" Lawton's appraisal. (R. 263).

At the close of the prosecution's evidence, each defendant rested without presenting evidence. Each defendant moved that the evidence received *de bene* against him be stricken. This was denied (R. 274).

The jury found all defendants guilty (R. 290) and the Court sentenced them.

Before argument in the Court of Appeals, while appeals were pending, motions were made to dismiss the indict-

ment because of adverse publicity resulting from a congressional investigation into the very land taking involved. These were denied. (R. 461-506). The Court of Appeals affirmed the judgments.

A consolidated petition for rehearing was made and denied. (R. 529-538).

Reasons for Granting the Writ

1. The Indictment Does Not State An Offense Against The United States of America.

a. The conspiracy statute, 18 U.S.C. S 371, under which petitioner has been convicted was construed in *Haas* v. *Henkel*, 216 U.S. 462, as being "broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." This construction of the statute was adopted by Chief Justice Taft in *Hammerschmidt* v. *United States*, 265 U.S. 182, 185-186, a case in which an indictment under Section 37 of the Penal Code, Comp. St. S 10201, (predecessor of Section 371), was held demurrable.

Neither in the indictment in this case nor in the evidence is there a showing of any pecuniary loss of the United States or of any interference or obstruction of its present functions. The indictment is couched in such futuristic terms as that the defendants had knowledge that Massachusetts *would* apply for and receive payments (R. 12), and that the cost of takings was *reimbursable* by the Bureau of Public Road. So far as appears, one function of the Bureau of Public Roads had ended, another not yet begun, during the period covered by the acts alleged in the indictment. The bare possibility that, at some time in the future, a function of the Federal Government might be obstructed by some act of the defendants is not enough to constitute a

Federal crime. "If Section 371 is to be expanded in such manner, truly, conspiracy is a boundless offense, and the door is opened to such nebulous charges that no man may draw a free breath." *United States* v. *Kaiser*, 179 F. Supp. 545, 548 (S.D., Ill. 1960).

Because no case has yet been decided by this Court involving the functions of the Federal Government under the Federal-Aid Road Act, and, because the decision of this case could have an impact on numerous other indictments presently pending in the District of Massachusetts, as well as upon the future course of action in other states, this question justifies the granting of the writ.

b. The application of 18 U.S.C. S 371 in the case at bar is in conflict with the decision of the District Court for the Southern District of Illinois in the *United States* v. *Kaiser*, *supra*. In Kaiser, an indictment charged a violation of Section 371 through a scheme to embezzle tolls collected on the Rock Island Centennial Bridge, a brige constructed by the City of Rock Island across the navigable waters of the Mississippi River by consent of Congress. The Act of Congress permitted the City to collect tolls to defray costs of operation and maintenance and to amortize the cost of construction so that eventually the bridge would be toll-free. The indictment alleged that the embezzlement of the tolls tended to obstruct and defeat the congressional purpose of an eventually toll-free bridge. The District Court dismissed the indictment for failure to charge an offense against the United States, and no appeal was taken.[1]

The inconsistency between the decision in the case at bar and Kaiser as to the permissible remoteness of the Federal Government's interest in a matter so as to justify a charge

[1] Since such an appeal would be taken directly to this Court under 18 U.S.C. S 3731, the only Court of Appeals review would come where the motion to dismiss had been denied *and* the defendant convicted at the trial of the case.

that its functions have been hindered, calls for a grant of certiorari.

2. THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE THAT THE DEFENDANT LAWTON KNEW OF AND PARTICIPATED IN A CONSPIRACY.

What happened to the petitioner, Lawton, is a horrible example of the evils inherent in a conspiracy prosecution. He has been dragged into a general and nebulous indictment and his protestations have been swept aside by the Government and the courts in cavalier fashion. It is not a pretty spectacle and should not commend itself to our appellate courts.

It is overwhelmingly clear that the Government did not present sufficient evidence to support a finding that Lawton knowingly participated in any conspiracy. Certainly, he is entitled to a more penetrating analysis of his actions than he has received to this date. In the brief for the appellants, filed in the Circuit Court, counsel attempted to assist the Court by separating the Lawton part of the case. They asked the specific questions, "When does the government say that the conspiracy was formed? When is Lawton supposed to have joined it? When did it jell?"

The Circuit Court refrained from answering these questions. The Court simply concluded that from "the various meetings of the alleged conspirators it can readily be inferred that they were engaged in the formulation and execution of a common purpose or plan . . . that . . . is clear enough to warrant the verdicts of the jury. It was to get for Webb what he wanted for the Damort land and to pocket the balance." (Infra p. 12a).

The Court of Appeals then made its remarkable statement that "The question is *not* the fair value of the land." (Infra p. 13a). (Emphasis ours).

In their consolidated petition for rehearing, the appellants again requested the Court of Appeals to inform them "of the date and the occasion on which it holds that the conspiracy became operative" (R. 532). The petition was denied without comment or decision.

These questions of date and fair value are not picayune, nor are they advanced in a quibbling manner merely to bother the Court. On the contrary, they go to very heart of Lawton's contention that his motion for judgment of acquittal should have been granted.

No useful purpose would be served by repeating in full our analysis of the charges and evidence against Lawton. (Supra pp. 5-7). However, certain statements of the Circuit Court should be considered against the background of the indictment and the trial.

One of the principal charges of the indictment is that the conspiracy was designed to impede and prevent "fair, honest, and disinterested valuation" of the Damont land (R. 12). According to the Government, the scheme was to arrange to have the first three appraisers each submit to the Department of Public Works an appraisal higher than the landowner "had demanded and agreed to accept." The part allegedly assigned to Lawton was that he would be appointed as *the* additional independent appraiser, and would similarly appraise the damages to be in excess of what the landowner was willing to take. Lawton is charged with conspiring to divert $1,500 out of a settlement of $60,000 to his own use. It should be noted that O'Connell is charged with diverting $30,000 "*to his own use*."

The chronology of events, as described in the evidence produced by the Government, demonstrates that Lawton could not have been guilty of participating in the conspiracy described in the indictment. Webb is supposed to have received the decisive call from Harney in the first half of June, 1959. It was on that occasion, Webb testified, that

he indicated his willingness to accept $30,000 for the Damort land. (Infra p. 8a). This was *after* he had instructed Myette to retain O'Connell. As a matter of legal fact, Webb was in no position to demand or to accept anything for the Damort land on the occasion of that call. The landowner's rights to damages did not accrue until August 10, 1959, when the land was taken. Until that event, no one had any right to entertain any demands or to negotiate settlements for the Commonwealth of Massachusetts. The record is barren of any indication by Webb to any person, alleged conspirator or not, that Damort would accept $30,000 for its land *after* the land was actually taken.

Up to the time of the actual taking, Lawton's only communication with any of the alleged co-conspirators was his conversation with Harney and his association with Myette. As a result of Webb's instructions to Myette, Lawton and his employee, Myette, went to Boston and retained O'Connell. After only one more meeting with O'Connell, Lawton was instructed by Webb not to concern himself with the negotiations for settlement. From that point on, there is no shred of evidence that Lawton was ever in contact with Harney or O'Connell or with any representative of the Commonwealth of Massachusetts except for his written appointment as the fourth appraiser.

We request the Court to consider carefully the situation as of the date that Lawton was instructed not to deal any further with O'Connell. The land had just been taken, but negotiations could not advance because no one had submitted an appraisal for the Commonwealth. Lawton had already performed all of the services he was ever to render to Damort with respect to its land. If and when the land was paid for, it seems that Lawton was to receive five percent (5%) of anything up to $30,000. Thus, the Lawton Company would get $1,500.00 if Damort received $30,000 net. Webb testified that this was how he arrived at his

figure of $1,500, and this is the entry on the stub of his check. It is extremely significant that the $1,500 was paid to Lawton Company out of the $30,000 received by Damort, and, apparently, was not considered as a part of the general settlement with the Commonwealth. The conclusion follows inevitably that Lawton did not gain and would not gain anything from any amount which Damort received in excess of $30,000. Thus, as of the fall of 1959, Lawton could gain nothing from a conspiracy to obtain more than $30,000 net for the Damort land. We submit that the Government's allegation that O'Connell did divert $30,000 to his own use eliminates the possibility of an assertion that Lawton participated in any sums paid by the Commonwealth in excess of $30,000.

It is even more significant to note that *prior to January, 1960, no one could know that Lawton would ever act as an appraiser of the Damort land.* As a matter of fact, no one could possibly know that there would ever be a fourth appraiser. (R. 116-118).

While Lawton was thus completely out of the picture, the alleged coconspirators, (not defendants), Hopkins, Collins, and Schwartz—in December of 1959, submitted their respective appraisals of $54,000.00, $65,000.00, and $67,000.00. It should be noted that Hopkins was the only one of these three put on the stand by the Government. His testimony is slightly more than one page long (R. 169). He was not asked about his appraisal or whether or not he had heard that Webb would accept $30,000. Thus, the Government made no attempt to support its allegations concerning the validity of these three appraisals. Instead, it chose to cast them in a bad light through the witness, Beasley.

There is no allegation or intimation that the members of the Real Estate Review Board of the Department of Public Works were involved in, or aware of, any conspiracy concerning the Damort land. Neither is there any suggestion

that they knew Mr. Harney or that he influenced that board. They could have determined the maximum out-of-court settlement at their meeting of January 21, 1960. They could have set this figure at the lowest appraisal of $54,000, or the highest appraisal of $67,000, or the average of the three appraisals which would have been $62,000. Had the Board done this, Lawton would have had no further association with the Damort land. Instead, the Review Board concluded that it would make no determination on that day and *requested* an additional independent appraisal. (R. 118). Thereafter, Lawton received a written appointment as the fourth appraiser of the Damort land. Again, there is no evidence to indicate that any of the alleged co-conspirators influenced this selection (R. 319 Exhibit 15), nor is there any slightest indication that Lawton ever communicated with any of the alleged co-conspirators, (except possibly Myette) between the receipt of his appointment and the submission of his appraisal.

At the moment of the receipt of his appointment as appraiser, what was Lawton's obligation to the Commonwealth of Massachusetts? (We submit that if he had any obligation to the United States of America, he was not aware of it.) In essence, it was to determine the damages suffered as a result of the taking, and these damages were to be measured by the fair market value to be arrived at after applying three specified methods. (R. 364, 365). Thereafter, Lawton appraised the property at its fair value defined as "that price at which a willing seller would sell who would not have to sell, and at which a willing buyer would buy who would not have to buy." The appraisal was predicated on the highest and best use of the land, that being for commercial and industrial purposes. (R. 423). To have done anything other than appraise the Damort land at its fair market value would have been a violation of Lawton's obligation to the Commonwealth of Massachusetts. There

is no evidence that he knew the gross figure that Damont would accept for the taking of its land, but even if he did have such information, his function was simply to give his opinion of the fair market value. It is not pertinent in this case to evaluate Lawton's judgment in accepting the appointment as appraiser.

The charge of the trial judge to the jury is studded with references to "fair market value." The jury is told three times that the Government must pay "just compensation if it takes another persons property." (R. 281). Just compensation is then defined as "fair market value." (R. 282). Shortly thereafter the judge says that the indictment charged the defendants with "impeding the fair valuation and negotiation for damages of the property in question." This is repeated in the very next paragraph. (R. 282). On the following page, the judge continues, "and if the conspirators defrauded and received money in excess of the value of the Webb land" then there is a crime against the United States. Thereafter he talks about whether or not the defendants conspired "to produce false valuations." (R. 283).

Later on, the trial judge states that the Government charges that the price of the land was increased by the "conspiracy of these defendants to get more than the land was worth." (R. 287). In view of the indictment, the evidence, and the charge, the statement of the Circuit Court, that "the question is not the fair value of the land", is startling. It is especially surprising when applied to the defendant Lawton. On or about February 13, 1960, when he submitted his appraisal, the fair value of the Damont land was the only question for him to consider.

The government charges Lawton with three principal acts as his part in the alleged conspiracy:

1. That he did divert $1,500 from the settlement amount to his company. We point out that Lawton would have

received the same sum of $1,500 if Damort had received a net of only $30,000.

2. That Lawton would be appointed as the fourth appraiser and would appraise the Damort land at more than Webb indicated he would accept. There is no evidence to support these serious allegations. On the contrary, we have demonstrated that the conspirators could not have anticipated the request for a fourth appraiser. Once appointed, Lawton's clear duty was to appraise the fair market value without references whatsoever to what the landowner might accept by way of settlement.

3. That Lawton and others did destroy certain records. If this incident occurred; it clearly took place after the alleged conspiracy had terminated and it could not possibly have been "part of the conspiracy."

We submit that the evidence is not of such a kind or quality as would have permitted a jury to find beyond a reasonable doubt that Lawton *knew of* and contributed to the conspiracy. The Government has failed to prove *knowledge* on Lawton's part that his acts "innocent in themselves" were aiding the conspiracy.

See: *United States* v. *Nardiello*, 303 F.2d 876 (1962) (Third Circuit).

With a single possible exception, every action of Lawton is as consistent with his complete innocence as with the possibility of his guilt. That single exception is the destruction of certain papers, which occurred *after* the conspiracy had terminated.

There are other conspiracy cases involving other appraisers now pending in the United States Court for the District of Massachusetts. Certiorari should be granted to clarify the quantum of evidence required to involve them in a charge of conspiracy against the United States.

3. The De Bene Evidence Should Not Have Been Admitted Against Lawton.

In the Statement (Supra pp. 7-9) we have described much of the evidence of acts and statements of certain of the alleged co-conspirators done or said in the absence of Lawton. Although the trial judge gave general instructions about this type of evidence (R. 138-140, 285) there was no guidance concerning when the conspiracy became effective. The Court of Appeals similarly dealt with this question in the most general terms.

This opinion throws the door open to all kinds of loose evidence without limitation as to time or content. It comes in *de bene*, and is then presented to the jury with the instruction: " . . . if you find from the evidence that these acts, singly or tied with other acts, are indicative of a conspiracy and convince you, added all together, beyond a reasonable doubt, that a conspiracy existed, then you might find the defendants guilty". (R. 285).

Lawton was thus burdened with evidence of incidents from which he was completely isolated. Certiorari should be granted to place some limitations on this device.

4. Evidence Concerning Destruction of Records.

Over petitioner's objection, the trial judge admitted evidence that he had participated in the destruction of certain records including his original bill to the landowner for a "commission" and substituting therefor a bill for services. The Court of Appeals justified the admission of this transaction as a part of the conspiracy even though it occurred after the conspiracy had terminated on the basis of a statement in *Lutwak* v. *United States*, 344 U.S. 604, 617, which differentiated between *acts* and *declarations* after a conspiracy had ended. There is nothing in the *Lutwak* deci-

sion, however, which indicates a retreat from the position taken by a virtually unanimous Court in *Krulewitch v. United States*, 336 U.S. 440, that there can be no furtherance of a conspiracy that has ended.*

Whether the conspiracy here was, as the trial judge instructed the jury, "to get more than the land was worth" (R. 287) or, as the Court of Appeals stated, to hoodwink Massachusetts "into paying more for the land than the owner was willing to accept" (*infra* p. 13a) the conspiracy had clearly run its course and served its purpose in March, 1969, when the Commonwealth settled with Webb for $60,000. Certainly, the evidence does not show that it was a part of the conspiracy described in paragraph 16 of the indictment (R. 12-13) that Lawton, Myette and Webb "would meet and together deliberately remove from the files of said Webb various documents pertaining to the Damon Land Corporation real property and destroy them for the purposes of concealing their contents". (R. 15).

Both Myette (R. 152) and Webb (R. 190) testified that this meeting came about as the result of investigations being conducted after the conspiracy had ended. What the two courts below have done here, in effect, is to revive the doctrine repudiated by this Court in *Krulewitch*, "that even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective." 336 U.S. at 443. If *Krulewitch* is to be overruled in this manner, a clear statement of the current law of conspiracy from this Court is in order.

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*The opinion of the Court holding declarations of one conspirator after termination of the conspiracy inadmissible was written by Mr. Justice Black. There was a concurring opinion by Mr. Justice Jackson in which Mr. Justice Frankfurter and Mr. Justice Murphy joined. Mr. Justice Burton, in a dissenting opinion conceded that the evidence was inadmissible but felt the error was harmless.

5. The Appearance Of Beasley And His Testimony Was Unfair And Prejudicial.

If all that was involved in this testimony of Oscar H. Beasley was the application of the best evidence rule, the question might not commend itself to the exercise of this Court's jurisdiction and would not come within the standards set out in Rule 19. There is, however, a more serious question involved here (which the Court of Appeals ignored completely in its opinion). It is the Government's motive in bringing Beasley from Washington to Boston and putting him on the stand. As was stated on cross-examination, "they didn't need a real estate expert to come up from Washington to compare a couple of pieces of paper . . ." (R. 267) which had been put into evidence. Nor was an expert necessary or proper to tell the jury how to add figures or what was contained in deeds recorded at a Registry of Deeds. The inference is, rather, that this witness was injected into the trial solely for the atmosphere he could generate—solely to impress the jurors with the gravity of a situation, and its nation-wide significance, which had required the attention of the Bureau of Public Roads in sending experts from Washington to investigate conditions in Massachusetts.

The duty of the prosecutor "is not merely to secure convictions. It is his duty to secure them with due regard to the constitutional and other rights of the defendant." *Smith v. Commonwealth*, 331 Mass. 585, 591 (1954), and cases cited; *Berger v. United States*, 295 U.S. 78, 88-89 (1935)."

In view of Beasley's completely negative contribution to the admissible evidence in the case, his presence in Boston can be explained only as being for the purpose of creating an atmosphere prejudicial to the defendants. *Viereck v. United States*, 318 U.S. 236 (1942); *Barr v. United States*, 248 F.2d 201 (C.A. 10, 1952); *Handford v. United States*,

249 F.2d 295 (C.A. 5, 1958); *United States* v. *Sprengel*, 103 F.2d 876 (C.A. 3, 1939).

The cases cited all involved prosecutors' arguments to the jury. However, there is no reason why the standard of conduct should be any lower in the matter of introduction of evidence than in argument to the jury. The Government's action in putting Beasley on the witness stand for the sole purpose of impressing the jury "was not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts." See: *Saldana* v. *United States*, 365 U.S. 646, 647 (1961). His testimony should have been excluded or stricken and the error in not doing so was compounded by reading it back to the jury. The jury itself demonstrated that it was impressed by this testimony by asking to have it made available to them. (R. 289-290). We do not have to assume *prejudicial error*. It has been disclosed. As in *Krakowitch* v. *United States*, 336 U.S. 440, 445, this erroneous admission of evidence and the impression it created may "have been the weight that tipped the scales against petitioner."

We submit that this Court, in the exercise of its supervisory power over the administration of our judicial system, should grant certiorari on this point.

6. There Was A Fatal Variance Between The Theory Of The Government And Court At The Trial And The Opinion Of The Court Of Appeals.

It is clear that the trial judge presented the case to the jury on the theory that the conspiracy, in part at least, was to get more than fair market value for the Damort land. In point 2 (Supra p. 17) we cited a number of instances in his charge enunciating this aspect of the case. Both the Government and the defendants accepted this approach

and the jury convicted the defendants by applying the law as given to them.

We submit that it was an imposition on the defendants to have this law of the case rejected by the Court of Appeals (Infra p. 13a).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 5956.

FRANCIS L. HARNEY, JR.,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

No. 5957.

CHARLES H. LAWTON, JR.,

DEFENDANT, APPELLANT,

v.

SAME.

No. 5958.

JAMES S. O'CONNELL,

DEFENDANT, APPELLANT,

v.

SAME.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Stanley H. Rudman for appellant in No. 5956.

John M. Russell, with whom *Lawrence R. Cohen* was on brief, for appellant in No. 5957.

G. Keefe Hurley, with whom *Earle C. Cooley* was on brief, for appellant in No. 5958.

Paul A. M. Hunt, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, and *Joseph F. Corrigan* and *John J. Curtin, Jr.*, Assistant U. S. Attorneys, were on brief, for appellee.

OPINION OF THE COURT.

July 18, 1962.

WOODBURY, *Chief Judge*. The appellants were indicted by a grand jury in the court below for conspiracy to defraud the United States in violation of Title 18 U.S.C. §371 quoted in the margin.[1] The indictment charged that the appellants with five others, Walter M. Webb, Felix J. Myette, Erroll G. Hopkins, Ernest T. Collins and Joseph L. Schwartz, who were named as conspirators but not as defendants, conspired to defraud the United States, particularly the Bureau of Public Roads of the Department of Commerce. The allegations are that the defendants-appellants, knowing that under the Federal Aid Road Act, 23 U.S.C. §101, *et seq.*, the Commonwealth of Massachusetts would apply for and receive from the United States through the Bureau of Public Roads payments in partial reimbursement for damages paid for lands taken for federal highway purposes, ". . . did combine, conspire, confederate, and agree" among themselves and with the co-conspirators named but not charged in the indictment "(a) to hamper, hinder, obstruct, and impede the lawful functions, operations and purposes of said Bureau of Public Roads of the Department of Commerce in the administration of the Federal Aid Highway program by impeding and preventing by craft, trickery and deceit a fair, honest, and disinterested valuation and negotiation of damages resulting from the taking by the Commonwealth of the real property owned by Damort Land Corporation; (b) to divert or cause to be diverted to the personal use, gain and

[1] "§371. Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

benefit of one or more of the defendants and co-conspirators a large portion of the money paid by the Commonwealth to Damoft Land Corporation in payment for the real estate taken from said corporation, the share of said payment reimbursable by said agency of the United States being ninety per cent, contrary to and in derogation of the purpose and intent of the Commonwealth in making the said payment and contrary to and in derogation of the purposes and intent of the Federal-Aid Highway program and (c) to cause the Commonwealth to pay to Damort Land Corporation in payment for the real estate taken from said corporation an amount of money far in excess of the sum which the said owner demanded and was willing to receive in full payment of its claim, all in violation of Title 18, United States Code, section 371."

On arraignment the defendants pleaded not guilty and soon thereafter the defendants severally filed motions to dismiss, motions to strike portions of the indictment and motions for a bill of particulars. The motions were denied after hearing, further motions to dismiss or in the alternative to continue the trial grounded upon alleged extensive adverse publicity were also denied, and, the defendants were set to the bar to be tried by jury. Motions to dismiss and for judgment of acquittal made at the conclusion of government counsel's opening statement to the jury were denied and motions for judgment of acquittal made at the conclusion of the government's evidence were also denied. Electing to introduce no evidence in their own behalf the defendants moved again for judgements of acquittal, and moved to strike portions of the indictment and all evidence admitted *de bene*. The court allowed the motions to strike as to paragraph 13 of the indictment insofar as it alleged that the land had been purchased by Damort on February 8, 1956, for $20,000, and as to the second overt act alleged, but otherwise denied the motions

and, denying some of the defendants' requests for instructions, submitted the case to the jury. The jury returned verdicts of guilty as to each defendant and thereafter the court, denying motions in arrest of judgment, motions for judgments of acquittal notwithstanding the verdicts or in the alternative for a new trial, passed the judgments of sentence from which these appeals have been taken.

The appellants charge the court below with numerous errors. Their general attack, however, boils down to six fundamental issues. These are whether the indictment alleges facts constituting an offense against the United States, whether the evidence introduced by the government supports the charges laid in the indictment, whether prejudicial pre-trial publicity deprived the appellants of a fair trial, whether the court erred in refusing to direct production by the government under the Jencks Act, Title 18 U.S.C. §3500, of a report of a subcommittee of the Public Works Committee of the United States House of Representatives known as the "Blatnik Committee," whether the court erred in the admission of certain testimony, particularly that of one Beasley, an expert appraiser called by the government, and whether it was error for the court below to have denied certain requests for instruction.

Our first concern is whether paragraph 16 of the indictment, quoted from at length above, charges an offense against the United States. That paragraph in substance charges the appellants with unlawfully conspiring among themselves and with five others (a), to impede the lawful functions of the federal Bureau of Public Roads by fraudulently preventing a fair and disinterested valuation and negotiation of the damages resulting from the taking of land of the Damon Land Corporation by the Commonwealth of Massachusetts for a link in a Federal Aid High-

way, (b) to divert to private use by the conspirators a portion of the money paid by the Commonwealth to Damort for its land, and (c) to cause the Commonwealth to pay an amount for the land far in excess of what the owner was willing to accept in full payment of its claim.

It is now beyond the shadow of doubt that aiding the states in the construction of interstate highways is a lawful function of the United States government. The question of federal power in this regard was said to be settled beyond question years ago in *California* v. *Central Pacific Railroad Co.*, 127 U.S. 1, 39 (1888). And in the leading case of *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924), Mr. Chief Justice Taft wrote for a unanimous Court:

> "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention."

Under this two-pronged interpretation of the statute paragraph 16 of the indictment to which we have referred certainly alleges an offense under the conspiracy statute, for, as will presently appear in detail in our discussion of the evidence, cheating or overreaching the Commonwealth with respect to the amount it paid for land taken by it for federal highway purposes would in the end expend itself upon the federal government to the extent of 90% under the federal aid road act thereby obstructing one of its lawful functions and if successful subjecting it to pecuniary

loss by causing it to pay more than it needed to for the land. The legal sufficiency of the indictment is so clear as not to require further discussion. See, however, *Green* v. *United States*, 28 F.2d 965 (C.A. 8, 1928); *Langer* v. *United States*, 76 F.2d 817 (C.A. 8, 1935), and *United States* v. *Weinberg*, 226 F.2d 161 (C.A. 3, 1955), *cert. denied*, 350 U.S. 933 (1956), for comparable situations in which indictments under the present conspiracy statute, or its substantially similar predecessor, were sustained. And see also *Curley* v. *United States*, 130 Fed. 1 (C.A. 1, 1904), *cert. denied*, 195 U.S. 628 (1904).

We come now to the question whether the evidence supports the charges laid in the indictment and the jury's verdicts of guilty as to each defendant.

In the light most favorable to the government the evidence can be stated as follows:

Prior to the time with which we are concerned, co-conspirator Walter M. Webb was the president, treasurer and sole stockholder of Damort Land Corporation, which owned an irregularly shaped tract of land consisting of 32,500 square feet with a large frame warehouse, a two story frame building, a spur track and a chain link fence on it in Attleborough, Massachusetts. The land lay unused and Webb had listed it with C. H. Lawton Co., a real estate firm in Pawtucket, Rhode Island, for sale. No buyer had been found, but the frame building had once been leased for a time to a concern in the dairy business.

Early in 1959 co-conspirator Myette, an employee of the Lawton real estate firm, attended a public hearing in Attleborough at which he learned that the Damort, or Webb, land, or a substantial part of it, would be taken by the Commonwealth for the construction of a link of Interstate Route 95, a highway under construction in sections under the Federal-Aid Highways Act, which, when completed, would extend from northern Maine to Miami,

Florida. Myette telephoned this information to Webb and suggested that the latter take the Damort property off the market because in his opinion the Commonwealth would prove to be the best buyer. Webb agreed and removed the property from the market. Later in 1959, probably in May, the defendant Harney, a right of way negotiator employed by the Massachusetts Department of Public Works who had been assigned to do preliminary work with respect to the taking of the Damort property, called Myette on the telephone as a result of which the two met and inspected the property. Harney asked Myette if the property belonged to Damort Land Corporation and if his firm was Damort's agent for the sale of the land. Receiving an affirmative reply to the first question and a reply to the second that the Lawton firm had handled the rental of the property, the two carefully examined the land.

Soon thereafter Harney telephoned Myette again and asked the latter to visit the property with him a second time. They met again on the property, this time with the defendant Lawton also, and on that occasion Harney said that the Commonwealth was going to take the land, and "In cases like this oftentimes it is better if the owner had some representation in Boston." Myette said he thought that "was probably the thing to do" and Harney recommended the defendant O'Connell as "a man who could help in getting as much money as possible for the land" saying, according to Myette's testimony, that O'Connell was a lawyer in Boston and had, Myette thought Harney said, "a brother in the Governor's office or something like that and he could make the way clear and easy for the sale of the property."

Myette reported this conversation to Webb who asked what Myette thought. Myette told Webb that he thought it was "all right, because it is being done and has been done" and Webb told Myette: "You go ahead; I haven't

got time to bother with it, you go ahead and handle it."

At about this time Harney called Webb on the telephone and asked him what he wanted for the Damort land. Webb replied that he wanted $30,000 and Harney then said: "If I get you $35,000, is that all right?" to which Webb answered: "O.K."

Soon after this conversation Lawton and Myette, pursuant to a telephone appointment, called on O'Connell in his Boston office. When they arrived Harney was there and after passing the time of day Myette asked O'Connell if he would represent Webb with respect to the taking of the Damort land. O'Connell replied that he would if Webb would send him a letter of authorization and Myette and Lawton then left, leaving Harney behind.

Myette gave Webb a report of the meeting over the telephone and on June 15, 1959, Webb by letter authorized the defendant Lawton to represent him in eminent domain proceedings with respect to the Damort land. Lawton then engaged O'Connell as legal counsel to handle the matter with the Massachusetts authorities and O'Connell entered his appearance for Damort with the appropriate Commonwealth officer.

On August 10, 1959, the Commonwealth officially took 29,500 square feet of the land as Parcels 105, 105a and 105b of Layout 4877 for completing a link in Interstate Route 95 by filing an order of taking in the Registry. The legality of the taking procedure is not questioned.

In the meantime Webb had called Myette several times on the telephone to inquire about O'Connell's progress and finally Myette and Lawton went to O'Connell's office by appointment. When they arrived Harney was there and O'Connell told them that he was making progress but these things take time. But he said he thought the matter would soon be concluded. Again Myette and Lawton left, leaving Harney behind.

Early in the fall "a man by the name of Mr. Potter" (not otherwise identified but apparently an employee of the Massachusetts Department of Public Works) appraised the damages to result to Damart from the taking of its land at $35,000, which appraisal was approved by one Thompson, also of the Massachusetts Department of Public Works. Potter's appraisal was described as a "windshield appraisal" meaning by that, we assume, a casual one made without a detailed study of the land or a full analysis of the elements bearing upon its value.

Every two or three weeks during the fall Wel visited O'Connell's office or called him on the telephone to inquire about progress. In mid-November co-conspirator Hopkins, a right of way negotiator for the Department of Public Works assigned to make a second departmental appraisal of the property, called Webb on the telephone to ask for keys and to make some inquiries about the land which Webb answered. Webb reported his call from Hopkins to O'Connell and at a later meeting in O'Connell's office, at which Harney was present, Webb asked about Hopkins and was told that "he was straightened out—taken care of." Hopkins later submitted an appraisal of $54,000 for the land.

In the meantime co-conspirators Collins and Schwartz had been appointed by some Commonwealth official in the Department of Public Works in substitution for two others, it does not appear who made the substitution, to appraise the Damart property as "outside" or "fee" appraisers, that is, appraisers outside the Department called upon for a fee to appraise special parcels taken by the Commonwealth.

Collins submitted an appraisal of $[illegible],000 for the land on December 28, 1959, and on the same date Schwartz submitted an appraisal of $67,000. The Real Estate Review Board of the Department after considering these appraisals

sent the Damort land matter back for another fee appraisal and the defendant Lawton was appointed as a third outside appraisar. He submitted an appraisal of $60,000 for the land in February 1960 and with it a certificate under oath that he had no interest in the land present or prospective and never had had any interest in it.

On the basis of the appraisals of Hopkins, Collins, Schwartz and Lawton the departmental Real Estate Review Board fixed the maximum figure for out-of-court settlement for the Damort land at $60,000 and sent Webb an agreement for settlement at that figure plus $212.03 for taxes. This gave Webb his first knowledge of the price the Commonwealth would pay for the land. Webb signed the agreement for settlement on March 1, 1960. The award of $60,212.03 was apportioned as follows: Damort Land Corporation c/o James S. O'Connell, Esquire, $47,383.37, City of Attleborough for taxes $558.69, and Rhode Island Hospital Trust Co., mortgagee, $12,269.97.

On April 1, 1960, Myette read in a newspaper that the Commonwealth had settled for the Damort property, and called Webb to tell him so. Webb replied that he had not yet received any money to which Myette said he replied: "Well, when you do I'd like to—you know, I'm a little bit short. I'd like to have some money." Myette said that actually Webb "didn't owe us a quarter" because they had not sold the property but that he thought Webb ought to pay something for the advice and service they had rendered. On April 21, 1960, Webb sent C. H. Lawton & Son a check for $1,500 which he said he calculated as 5% commission for the sale of the land at $30,000.[2] Myette and the Lawton Company divided the amount of the check equally between them.

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[2] Webb indicated on the stub of the check that it was drawn as 5% commission on $30,000 and C. H. Lawton Co. billed Webb for a $1,500 "commission." This bill was later destroyed and another substituted "for services."

On April 4, 1960, Webb by appointment met with Harney at O'Connell's office. At that time O'Connell had a check from the Commonwealth payable to "Damont Land Corp." dated March 31, 1960, in the amount of $47,383.37, *i.e.*, the difference between the gross award of $60,212.03 and the amount, $12,828.66, due the Rhode Island Hospital Trust Co. on its mortgage. Webb endorsed the check and, demanding a receipt, left it with O'Connell. On this occasion Webb asked how the final price had been arranged and Harney told him that three appraisals had been obtained for $67,000, $64,000 and $57,000 and that when a fourth was required Lawton had made one for $60,000. When Webb asked what he should do if any one asked him questions about the land, he was advised to say that it was worth $60,000, that he had met O'Connell prior to the transaction, and that it would not be "wise" to indicate that he had met Harney in O'Connell's office.

A few days later at O'Connell's office Webb was handed a check drawn by O'Connell on his client's account for $17,383.37[3] payable to Damont Land Corp. as his share of the settlement. Webb photostated the check before he cashed it.

Webb admitted that he had never made any fee arrangement with O'Connell and that he was never billed by O'Connell for a fee. He said that he understood that he was to get what he wanted for the property, that is to say $30,000, and that O'Connell would get any excess over that amount.

During the summer of 1960 agents of the Federal Bureau of Investigation and representatives of the so-called Blatnik Committee of the United States House of Representatives initiated investigations of land takings for federally

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[3] Gross settlement $60,212.03 minus $12,828.66 due on the mortgage less $30,000 remaining in O'Connell's hands. Or, the amount of the Commonwealth's check payable to Damont Land Corporation delivered to O'Connell, $47,383.37, minus $30,000.

aided highways in Massachusetts. These investigations had extensive publicity and included investigations of the taking of the Damort property in the course of which Webb was interviewed several times both by agents of the FBI and by agents of the Blatnik Committee. Evidently these investigations caused the alleged conspirators some concern for in August, or perhaps even a month or two earlier, Myette and Lawton met with Webb at his office in Boston and matching the Webb and Lawton files removed and destroyed all letters or other papers having any reference to a $30,000 valuation of the Damort land including Lawton's bill to Webb for $1,500 "commission."

We have stated the Government's evidence at length, not to weigh its credibility, that is the jury's function, but to demonstrate its legal sufficiency to support the charge laid in the indictment and the verdicts of guilty as charged. But in performing our function we do not necessarily have to look for direct evidence of a conspiracy for: "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), citing and quoting Mr. Justice Sutherland in *United States* v. *Manton*, 107 F.2d 834, 839 (C.A. 2, 1938); *cert. denied*, 309 U.S. 664 (1940).

From the various meetings of the alleged conspirators it can readily be inferred that they were engaged in the formulation and execution of a common purpose or plan of action with respect to the taking of the Damort land. And what that common plan or purpose was is clear enough to warrant the verdicts of the jury. It was to get for Webb what he wanted for the Damort and and to pocket the balance. Whether the $30,000 over and above what Webb wanted for the land remained in O'Connell's hands or was later distributed by him makes no difference. It is enough

that the jury could reasonably find that by means of the plan the Commonwealth was hoodwinked into paying more for the land than the land owner was willing to accept and that the excess found its way, in the first instance at least, into the pocket of one of the conspirators. And as will presently appear, this is enough to sustain the charge of interference with a lawful function of the United States as well as the Commonwealth of Massachusetts.

The appellants, however, contend that the evidence is fatally deficient in two respects. The asserted deficiencies are lack of evidence that the Commonwealth in fact paid more than the fair value of the land and lack of evidence of a sufficient interest of the United States in the taking to warrant indictment and conviction of the appellants for conspiracy to defraud the United States. We reject both contentions.

It is, of course, the constitutional duty of the United States to pay fair value for any land it takes for public purposes. But this does not prevent a land owner from giving his land to the United States in whole or in part. Nor does it prevent the United States from making an advantageous bargain with a land owner provided, of course, that it does so in a fair, honest and above board transaction. The question is not the fair value of the land. It is whether by chicane the Commonwealth was beguiled into paying more for the land than the land owner acting as a free agent fully able to protect himself (from his testimony it would appear that he is an experienced and competent business man who was fully aware of what he was doing) was willing to accept. *See United States* v. *Weinberg*, 226 F.2d 161, 167 (C.A. 3, 1955), *cert. denied*, 350 U.S. 933 (1956). And see also *Green* v. *United States*, 28 F.2d 965 (C.A. 8, 1928).

In answering the appellants' other contention it is not necessary to undertake a detailed analysis of the Federal

Aid Highways Act, 72 Stat. 885 (1958), Title 23 U.S.C. §101 *et seq.*, as it stood at the time involved and the administrative procedures under it. It will suffice to say that under the Act and the regulations the highway department of any state desiring to avail itself of federal aid for its highways first submits to the Secretary of Commerce a program of projects for which federal funds previously apportioned to the state by the Secretary are desired, and upon program approval, the state as soon as practicable submits for approval by the Secretary "such surveys, plans, specifications, and estimates for each proposed project . . . as the Secretary may require." §106(a). When the Secretary has approved a project as conforming to statutory standards, funds out of those he has previously apportioned to the state are administratively set aside for the project, the state is authorized to proceed with the project and the Secretary's ". . . approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." §106(a).

In the case at bar this stage was reached at least by April or May 1959, for on September 19, 1958, the Bureau of Public Roads reserved $4,000,000 on its books for the link in Interstate Route 95 from the Rhode Island-Massachusetts line to North Attleborough with which we are concerned, on April 10, 1959, the Chief Engineer of the Massachusetts Department of Public Works submitted plans for the acquisition of right of way for the project, referring to a report and certification of a public hearing, and an estimate of right of way costs of $2,610,000 to the Bureau of Public Roads and on May 8, the Division Engineer of the federal Bureau approved the project and authorized the Commonwealth Department "to proceed with the acquisition of right-of-way."

This is by no means a detailed statement of the pro-

cedures under the statute. But it is enough to show the close relationship between the state and federal governments in the construction of federally aided interstate highway systems. And it is also enough to show that by the time with which we are here concerned the project for which the Damon land was acquired was more than a hope. At the time of the taking, indeed for some time before, federal participation in the construction of the Rhode Island-Attleborough link was not a mere vague possibility for some time in the future but an immediate practical reality with federal funds set aside to pay for the right of way required. It is, of course, not necessary to show that federal funds were actually paid to the Commonwealth in 90% reimbursement for its taking of the Damon land. Conspiracy is a crime even though the contemplated offense may never be consummated. It is enough to show a scheme whereby through fraud federal funds in normal course would be diverted from their true and lawful object. That has been shown, for the thrust of the fraudulent scheme alleged and proved to the jury's satisfaction was directed against and would expend itself on the federal fisc. See *McGunnigal* v. *United States*, 151 F.2d 162 (C.A. 1, 1945), *cert. denied*, 326 U.S. 776 (1945).

We come now to the question whether extensive adverse publicity deprived the appellants of a fair trial or at least required the court below in the sound exercise of its discretion to grant a continuance.[4]

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[4] The appellants' contention that the indictment should be dismissed because of hostile publicity was answered by this court in *Delaney* v. *United States*, 199 F.2d 107, 112 (C.A. 1, 1952), where in we said:

> "Nor could it be said, in this case, if indeed it could be said in any case, as a matter of law, that the prejudicial effect of this publicity was so permanent, and ineradicable by mere lapse of time, that the court should have recognized the impossibility of a fair trial ever being held at any time within the foreseeable future."

No doubt extensive publicity attended the investigations by the FBI and the Blatnik Committee of the scandals attendant upon the taking of lands in Massachusetts for federally aided highway purposes. But granting all the appellants say as to the scope and intensity of the pre-trial publicity, the situation disclosed falls far short of that considered by this court in the *Delaney* case cited in footnote 4 above. Moreover, it even falls short of the publicity we considered in *Geagan* v. *Gavin*, 292 F.2d 244 (C.A. 1, 1961), *cert. denied*, May 28 1962, *rehearing denied*, June 25, 1962, in which we held that in spite of the pre-trial publicity shown, the jurors fully met the constitutional test for impartiality laid down in *Irvin* v. *Dowd*, 366 U.S. 717 (1961). Moreover the publicity alleged in this case is not as violent or vitriolic as that reviewed by the Court in *Beck* v. *Washington*, 369 U.S. 541 (1962).

We shall not undertake to describe the publicity said to have fatally infected the fairness of the trial or at least to have required continuance. It will be enough to say that an examination of the record discloses that in this case as in *Geagan* v. *Gavin* the court below carefully screened each petit juror on *voir dire* for bias and prejudice engendered by the publicity and carefully cautioned the jurors not to read newspaper accounts or listen to radio reports of the trial during its progress. Enough was done to assure a fair trial. For as the late Judge Learned Hand said in *United States* v. *Dennis*, 183 F.2d 201, 226 (C.A. 2, 1950), *affirmed*, 341 U.S. 494 (1951):

> "Certainly we must spare no effort to secure an impartial panel; but those who may have in fact committed a crime cannot secure immunity because it is possible that the jurors who try them may not be exempt from the general feelings prevalent in the society in which they live; we must do the best we can with the means we have."

Now we come to questions of the admission and exclusion of evidence. We shall consider only a few of the many questions in this category which have been raised, rejecting others as too insubstantial to warrant discussion.

The first question for consideration is whether a certain report of the Blatnik Committee is producible under the Jencks Act, 18 U.S.C. §3500.

Webb testified on cross-examination that twice during the fall of 1960 he was interviewed by agents of the FBI and that in the first half of 1961 he was interviewed some six or eight times by representatives of the Blatnik Committee. Counsel for the defendant demanded and were given the reports of the FBI and then they demanded the reports of the Blatnik Committee. In response to this demand counsel for the United States at the bench said that the Blatnik Committee made no such report as that demanded but there was a three page summary. But the government's counsel said that they believed an examination of the document by the court under the Jencks rule would show that it was not the kind of "statement" required to be produced because it was only an unsigned "compilation" of the interviews of witnesses. The report was then handed to and examined by the court which then said to counsel for the defendants: "I will deny your request. You can mark it for identification if you wish, but I will not allow you to see it." The report was then marked as an exhibit for identification and impounded by the court.

An examination of the exhibit clearly shows that it is not a "statement" of the witness, Webb, within the definition of subsection (e) of the Jencks Act. It is only an unsigned summary of the evidence, some of it attributed to Webb, prepared by someone, we know not whom, bearing upon the taking. It is a statement of the facts obviously drawn from a variety of sources roughly comparable to the statement of facts embodied in this opinion.

Moreover, counsel for the defendants did not make out a *prima facie* case of entitlement to the report thereby requiring the court under *Campbell* v. *United States*, 365 U.S. 85 (1961), to hold a preliminary hearing to determine its producibility by showing through Webb that committee representatives had taken down what Webb said by mechanical or equivalent means or that they had written down what he said and he by signature or its equivalent had approved what the investigators wrote down. In short, the report is not producible as a "statement" under the Jencks Act and there is no evidence to warrant a preliminary hearing to determine its producibility.

The third question for consideration in this category can be answered briefly. Evidence of the declarations of one conspirator not made in the presence of all were admitted *de bene* under appropriate instructions that the jury were not to consider such declarations as binding upon a conspirator not present until it was satisfied from other evidence that the conspiracy alleged in fact existed, and that the absent one implicated in the declaration was involved in the conspiracy. This was not error. *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953). Nor was there error in admitting evidence of the *act* of destroying Lawton's original bill to Webb for "commission" and the substitution of a bill for services even though the *act* took place after the conspiracy alleged had terminated. *Lutwak* v. *United States*, supra at 617, 618. The same is true with respect to the evidence of the destruction of correspondence reflecting a valuation of $30,000.

The only remaining question in this group which we shall consider is the admissibility of a portion of the testimony of the government's expert appraiser, one Beasley. He testified over general objection that the Collins and Schwartz appraisals contained an identical error with respect to the grantor and the area of a parcel of land in

Attleborough which both had listed in their appraisal reports as a sale of land comparable to that taken from Damort. The reports of both appraisers listed as comparable a sale by Whitman's Diner, Incorporated, to Almac's Incorporated, of 48,224 square feet of land whereas, as Beasley said, his personal examination of the records in the Registry showed that the grantor was John Bellegris, and that the parcel conveyed consisted of 120,724 square feet.

Technically, introduction of Beasley's oral testimony as to what he had seen in the records in the Registry violated the "best evidence," or perhaps more accurately the "original document," rule which requires that the contents of a document must be proved by introduction of the document itself. The rule rests upon a policy of precision, it being considered better to present a document to a court rather than to incur the risk of fallibility of human memory or the risk of error in human copying. But oral testimony of the contents of a written document is not inadmissible *per se*, for under a well recognized exception to the rule such testimony is admissible when it is satisfactorily established that the original document is unavailable, as by loss or destruction. Thus, Beasley's oral testimony would have been admissible had it been shown that the Registry had burned down and the original deed had been lost.

There was no such showing in the case at bar. But none was called for by the appellants' general objection nor did that objection alert counsel for the government to the necessity for producing the original deed, or a certified copy thereof, or showing its unavailability, in order to obviate the objection which we may assume could readily have been done at the trial thereby avoiding another trial to correct the error.

It is true that the generally salutary rule of the common law embodied in Rule 51 of the Federal Rules of Criminal Procedure quoted in material part in the margin[5] that objection to the admissibility of evidence must be accompanied by a reasonably definite statement of grounds in order to inform the court and opposing counsel of the nature of the objection so as to afford an opportunity to remedy the asserted defect may often be honored in the breach, as when the evidence is inadmissible on any ground, when the ground for exclusion is obvious or perhaps when the asserted ground for exclusion could not have been cured. *Noonan* v. *Caledonia Mining Co.*, 121 U.S. 393, 400 (1887). See McCormick, Evidence 118 (1954). However, none of these situations is present here. And had the court and opposing counsel been warned by a statement of the ground for the appellants' objection, the asserted defect could either have been readily cured or counsel for the government could have elected to omit the testimony. Under the circumstances of this case we are not disposed to overlook strict compliance with the clear requirement of the common law and Rule 51, *supra*. The defendants have had the fair trial to which they were entitled. They cannot demand one free of any error whatsoever. See *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953), in which the Court said: "A defendant is entitled to a fair trial but not a perfect one."

What has already been said disposes of several of the defendants' objections to the court's failure to charge in accordance with their requests. Other of their requests

[5] "Rule 51. EXCEPTIONS UNNECESSARY

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court *and the grounds therefor;* . . ." (Italics Added)

were adequately covered in the charge as given. There was no prejudicial error in the charge.

Arguments and contentions of the defendants not covered in this opinion have been considered only to be rejected as not warranting discussion.

Judgments will be entered affirming the judgments of the District Court.

Appendix B

Statutes and Regulations Involved

Statutes

18 U.S.C., Section 371—Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

23 U.S.C., Section 101—Definitions and declaration of policy.

(a) As used in this title, unless the context requires otherwise—

The term "apportionment" in accordance with section 104 of this title includes unexpended apportionments made under prior acts.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the Coast and Geodetic Survey in

the Department of Commerce), costs of rights-of-way, and elimination of hazards of railway-grade crossings.

The term "county" includes corresponding units of government under any other name in States which do not have county organizations, and likewise in those States in which the county government does not have jurisdiction over highways it may be construed to mean any local government unit vested with jurisdiction over local highways.

The term "forest road or trail" means a road or trail wholly or partly within or adjacent to and serving the national forests.

The term "forest development roads and trails" means those forest roads or trails of primary importance for the protection, administration, and utilization of the national forests, or where necessary, for the use and development of the resources upon which communities within or adjacent to the national forests are dependent.

The term "forest highway" means a forest road which is of primary importance to the States, counties, or local communities within, adjoining, or adjacent to the national forests.

The term "highway" includes roads, streets, and parkways, and also includes rights-of-way, bridges, railroad-highway crossings, tunnels, drainage structures, signs, guardrails, and protective structures, in connection with highways. It further includes that portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State highway department including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

The term "Federal-aid highways" means highways located on one of the Federal-aid systems described in section 103 of this title.

The term "Indian reservation roads and bridges" means roads and bridges that are located within an Indian reservation or that provide access to an Indian reservation or Indian land, and that are jointly designated by the Secretary of the Interior and the Secretary as a part of the Indian Bureau road system.

The term "maintenance" means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for its safe and efficient utilization.

The term "park roads and trails" means those roads or trails, including the necessary bridges, located in national parks or monuments, now or hereafter established, or in other areas administered by the National Park Service of the Department of the Interior (excluding parkways authorized by Acts of Congress) and also including approach roads to national parks or monuments authorized by the Act of January 31, 1931 (46 Stat. 1053), as amended.

The term "parkway" as used in chapter 2 of this title, means a parkway authorized by an Act of Congress on lands to which title is vested in the United States.

The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed.

The term "project agreement" means the formal instrument to be executed by the State highway department and the Secretary as required by the provisions of subsection (3) of section 110 of this title.

The term "public lands highways" means main highways through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations.

The term "rural areas" means all areas of a State not included in urban areas.

The term "Secretary" means Secretary of Commerce.

The term "State" means any one of the fifty States, the District of Columbia, or Puerto Rico.

The term "State funds" includes funds raised under the authority of the State or any political or other subdivision thereof, and made available for expenditure under the direct control of the State highway department.

The term "State highway department" means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction.

The term "Federal-aid system" means any one of the Federal-aid highway systems described in section 103 of this title.

The term "Federal-aid primary system" means the Federal-aid highway system described in subsection (b) of section 103 of this title.

The term "Federal-aid secondary system" means the Federal-aid highway system described in subsection (c) of section 103 of this title.

The term "Interstate System" means the National System of Interstate and Defense Highways described in subsection (d) of section 103 of this title.

The term "urban area" means an area including and adjacent to a municipality or other urban place having a population of five thousand or more, as determined by the latest available Federal census, within boundaries to be fixed by a State highway department subject to the approval of the Secretary.

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the thirteen years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1969, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce. Added Pub.L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 885, amended Pub.L. 86-70, § 21(c)(1), June 25, 1959, 73 Stat. 146; Pub.L. 86-624, § 17(a), July 12, 1960, 74 Stat. 415.

23 U.S.C., Section 105—Programs.

(a) As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part,

but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

(b) In approving programs for projects on the Federal-aid secondary system, the Secretary shall require, except in States where all public roads and highways are under the control and supervision of the State highway department, that such project be selected by the State highway department and the appropriate local officials in cooperation with each other.

(c) In approving programs for projects on the Federal-aid primary system, the Secretary shall give preference to such projects as will expedite the completion of an adequate and connected system of highways inter-state in character.

(d) In approving programs for projects under this chapter, the Secretary may give priority of approval to, and expedite the construction of, projects that are recommended as important to the national defense by the Secretary of Defense, or other official authorized by the President to make such recommendation.

(e) Repealed. Pub.L. 86-624, § 17(b), July 12, 1960, 74 Stat. 415. Added Pub.L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 891, amended Pub.L. 86-624, § 17(b), July 12, 1960, 74 Stat. 415.

23 U.S.C., Section 106. Plans, specifications and estimates.

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and no

approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

(b) In addition to the approval required under subsection (a) of this section, proposed specifications for projects for construction on the Federal-aid secondary system, except in States where all public roads and highways are under the control and supervision of the State highway department, shall be determined by the State highway department and the appropriate local officials in cooperation with each other.

(c) Items included in any such estimate for construction engineering shall not exceed 10 per centum of the total estimated cost of the project, after excluding from such total estimated cost, the estimated costs of rights-of-way, preliminary engineering and construction engineering. Added Pub.L. 85-767, § 1, Aug. 23, 1958, 72 Stat. 892.

23 U.S.C., Section 108 — Advance acquisition of rights-of-way.

(a) For the purpose of facilitating the acquisition of rights-of-way on any of the Federal aid highway systems, including the Interstate System, in the most expeditious and economical manner, and recognizing that the acquisition of rights-of-way requires long planning and negotiations if it is to be done at a reasonable cost, the Secretary, upon the request of the State highway department, is authorized to make available the funds apportioned to any State for expenditure on any of the Federal-aid highway systems, including the Interstate System, for acquisition of rights-of-way, in anticipation of construction and under such rules and regulations as the Secretary may prescribe. The agreement between the Secretary and the State highway depart-

ment for the reimbursement of the cost of such rights-of-way shall provide for the actual construction of a road on such rights-of-way within a period not exceeding ten years following the fiscal year in which such request is made.

(b) Federal participation in the cost of rights-of-way acquired under this section shall not exceed the Federal pro rata share applicable to the class of funds from which Federal reimbursement is made. Added Publ. 85-767, Aug. 27, 1958, 72 Stat. 893, amended Publ. 86-[illegible], May 29, 1959, 73 Stat. 62.

23 U.S.C., Section 109 - Standards.

(a) The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

(b) The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State highway departments. Such standards shall be adequate to accommodate the types and volumes of traffic forecast for the year 1975. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System up to such standards. The Secretary shall apply such standards uniformly throughout the States.

(c) Projects on the Federal-aid secondary system in which Federal funds participate shall be constructed according to specifications that will provide all-weather service and permit maintenance at a reasonable cost.

(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

(f) The Secretary shall not, as a condition precedent to his approval under section 106 of this title, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces; median strips, gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking. Added Pub.L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 894.

23 U.S.C., Section 110—Project agreements.

(a) As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secretary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project

agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

Massachusetts General Laws, Chapter 79, Section 12 — Measure of damages.

The damages for property taken under this chapter shall be fixed at the value thereof before the taking, and in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made; and there shall be deducted the benefit accruing to the part not taken unless it was stated in the order of taking that betterments were to be assessed. In determining the damages to a parcel of land injured when no part of it has been taken, regard shall be had only to such injury as is special and peculiar to such parcel, and there shall be deducted the benefit accruing to such parcel, unless it was stated in the order of taking, or if there was no taking in the order for the establishment, construction, alteration, repair or discontinuance of the public improvement which caused the injury, that betterments were to be assessed. Whenever the title or interest taken is such that the property will be exempt from taxation so long as it is held and used for the purposes for which it is taken, the damages for the taking shall include an amount separately determined and stated which shall be estimated to be equal to that portion of the tax assessed upon the property in the year it is taken which, if the tax were apportioned pro rata according to the number of days in such year, would be allocable to the days ensuing after the taking. As amended St. 1953, c. 634. 1.